Supreme Court, U.S.
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No. 97-343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SHERRY BURT,

Petitioner,

v.

DWIGHT RASHAD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

DO SUCCESSIVE PROSECUTIONS FOR THE POSSESSION OF MULTIPLE CACHES OF CONTRABAND VIOLATE THE DOUBLE JEOPARDY CLAUSE WHEN SAID POSSESSION CONSTITUTES A SINGLE OFFENSE?

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STATEMENT OF THE CASE

Respondent accepts the facts as stated in Petitioner's "Statement of the Case". Additional facts where relevant are set forth within Respondent's "Reasons for Denying Writ of Certiorari".

REASONS FOR DENYING WRIT OF CERTIORARI

Respondent maintains that successive prosecutions for possession of separate stashes of contraband violate the Fifth Amendment prohibition against Double Jeopardy. As a result of Respondent having been twice charged and convicted of the identical offense, possession with intent to deliver cocaine, (MCL 33.7401) the "same elements" test set forth in *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932) appears to have been met:

> In general terms, the elements of the offense in each prosecution were the same because each offense involved a violation of the same statutory provision, *Petitioner's Petition for a Writ of Certiorari* (Page 18).

However, the courts below have concluded that a traditional *Blockburger,* analysis will not suffice in this instance:

> Although it plays a permanent role in double jeopardy analysis, the *Blockburger* test is insufficient where as here, the concern is not multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transactions, *Rashad v. Burt,* 108 F.3d 677 (6th Cir. 1997) at page 679.

Respondents maintains, as the the Sixth Circuit Court of Appeals in *Rashad,* at page 680, that "multiple charges

that satisfy the *Blockburger* standard, and thus may properly be joined in a single prosecution, may nevertheless violate double jeopardy if prosecuted successively", citing *Jordan v. Commonwealth of Virginia,* 653 F.2d 870, 873 (4th Cir. 1980). As more fully set forth in *Jordan,* the Court of Appeals for the Fourth Circuit stated:

> Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in *Blockburger* and *Gore*: the protection against retrial itself. In this component, double jeopardy vindicates principles of finality and repose of former judgments and of fundamental fairness and simply are not involved in a joined charged prosecution. Basically it insures that having once "run the gauntlet" of criminal trial to judgment either of conviction or acquittal, a person shall not be required to run essentially the same gauntlet again. It protects not only against multiple punishments but against multiple trials for the same offense. See *United States v. Wilson,* 420 U.S. 332, 343-44 (1975); *Green v. United States,* 355 U.S. 184, 187-88 (1957); *United States v. Oppenheimer,* 242 U.S. 85 (1916). Because an additional interest is at stake, the test for determining whether the "same offense" is involved in successive prosecutions is one more protective of criminal defendants than the relatively strict "two offense" test of *Blockburger* that is decisive against defendants when satisfied in single prosecutions. *Jordan,* supra at 873.

As indicated by the Court of Appeals for the Sixth Circuit in *Rashad,* "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense", citing *Brown*

v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) at 166 n.6.

Granted, this Court in *United States v. Dixon,* 509 U.S. ___ , 125 L.Ed.2d 556, 113 S.Ct. 2849 (1993) reversed the "same transaction" test announced in *Grady v. Corbin,* 495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 (1990), just three years earlier. Further, a majority of this Court in *Dixon,* rejected the analysis which subscribed to affording different meanings to the Double Jeopardy Clause insofar as the "successive prosecution strand" is concerned, *Dixon* at 556. That being the case, Respondent maintains that *Dixon* should not be read to approve of multiple prosecutions where the activity charged constituted a single offense.

Petitioner has confused the issue by claiming the Sixth Circuit Court of Appeals adopted a "same transaction" test, rather than reversing a successive prosecution of Respondent for what was a single offense. What the Sixth Circuit Court of Appeals has prohibited in *Rashad,* is a successive prosecution where the charges should have been joined and where no significant additional fact was required for the second prosecution. Language in *Dixon,* at page 573, permitting the prosecution to feel "free to bring them separately, and . . . win convictions in both", should not be construed to permit the prosecution to take a single criminal episode and divide it into two separate prosecutions. Where the criminal activity charged in successive prosecutions results from a single transaction involving the same elements, one trial is all the prosecution is entitled to. It is well settled that double jeopardy protections may not be avoided by the simple expedient of exercising prosecutional discretion to "divide a single crime into a series of temporal or spatial units", *Jordan* at page 875.

In this respect, the cases of *United States v. Woods*, 568 F.2d 509 (6th Cir. 1978) and *United States v. Stephens*, 1997 Fed. App. 0095P (6th Cir) are illustrative. In both cases the defendants were charged with multiple drug offenses involving separate caches of narcotics. In reversing the multiple convictions in *Stephens*, the Sixth Circuit Court of Appeals stated:

> Thus, the structures of *Woods* control and require that Stephens be convicted of only one count of possession with intent to distribute cocaine. Therefore, the district court erred by failing to merge the two offenses.

Granted several other circuits have held that where multiple stashes of drugs can be demonstrated to be intended for different purposes or transactions, conviction of separate counts will not violate the Double Jeopardy Clause (see cases cited, *Petitioner's Petition for Writ of Certiorari*, pps. 20-25). However, in the absence of "demonstrated intent" that the two possessions were for different purposes or transactions, their possession should have been charged in a single prosecution. See *United States v. Johnson*, 977 F.2d 1360, 1374 (10th Cir. 1992). It is interesting to note the troubling aspect of future prosecutions in this area where the prosecution is free to take "two bites at the apple". In *People v. Hahn*, 183 Mich. App. 468 (1990), police seized separate caches of drugs throughout the defendant's house and in his car. In Michigan, separate statutes and penalties exist for increasing amounts of drugs. In *Hahn*, the single prosecution of the defendant was based upon the combined total of the drugs seized in both his residence and vehicle. The defense objected to consolidation of the cocaine contending it was discovered in

different locations. The Michigan Court of Appeals disagreed, stating:

> Since the record discloses sufficient evidence from which it can be determined that defendant possessed all the separate amounts, it logically follows that defendant also possessed the total amount, at 470.

In the instant case, had the total of *each* of the two caches not exceeded 650 grams, Respondent would have faced a single prosecution in which both caches were added together in order to achieve the most severe penalty. Thus, it would have been the Petitioner and not the Respondent calling for a single prosecution.

Prosecutors should not have the luxury of selecting whether to add the caches in a single prosecution or to initiate separate prosecutions at their whim. Only where it can be clearly shown that the two caches represent different transactions, should multiple counts be allowed, let along multiple convictions. In this particular case there was ample time to notify Respondent and for Petitioner to prepare for a single prosecution involving all of the contraband.

With respect to the similar nature of the two possessions, Petitioner in its Brief on Appeal to the Sixth Circuit, admitted that "there is no question that similarities exist between the two prosecutions, p. 18. Those facts which suggest that the instant case constitutes only one offense are as follows:

1. Both offenses occurred on the same date and at the same time.

2. Both offenses occurred in approximately the same location, Respondent's residence and a vehicle parked outside his residence.

3. Both offenses involved possession of several kilograms of cocaine similarly wrapped and packaged.

4. Both stashes were in close proximity to several clear empty plastic bags.

5. Both stashes were hidden, one in a secret panel in Respondent's automobile and the other in a locked storage area under the basement stairway.

6. Both stashes indicated a single intent and goal (i.e., distribution).

7. Keys to both the vehicle and locked storage compartment were discovered on a key chain inside the brief case Respondent carried into his residence.

8. The witnesses necessary to prosecute Respondent for both caches of cocaine are virtually identical.

Granted, the cocaine in Respondent's vehicle was not discovered until several days after the vehicle was impounded and ultimately searched by police. However, the protection against successive punishments for the same offense should not be predicated upon the comprehensive nature of the search by police.

By dividing the prosecution into two separate cases, Petitioner was able to double the odds in favor of at least one conviction, wear down the defense (second trial was a bench trial unlike the first) and neutralize any previously asserted defense strategy. If separate stashes of contraband are to be merged for purposes of a defendant's claim of multiplicity, then successive prosecutions must also fail. As quoted by the Sixth Circuit in *Stephens,*:

> "we see no indication that Congress intended to permit multiplication of the offenses of possession at any given time by a defendant upon evidence that the heroin may merely have been separately packaged or stashed". *Woods,* at 513-14.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny plenary review, and affirm the holding of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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December 15, 1997

APPENDICES

Respondent is satisfied with Appendix "A", "B", "C" and "D" as set forth in the Petition For A Writ of Certiorari, filed by Petitioner.